



VIA ELECTRONIC MAIL (wrhearing@waterboards.ca.gov)

June 19, 2009

State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95814

Re: Hearing to Consider Modification of Order WR 2006-0006

Dear Members of the Board:

The State Water Resources Control Board has noticed a hearing to consider whether to modify the Cease and Desist Orders issued to the United States Bureau of Reclamation (“USBR”) and the Department of Water Resources (“DWR”) pursuant to SWRCB Water Right Order 2006-0006. With respect to the key issues for the hearing listed in the June 5, 2009 Notice of Public Hearing, the San Joaquin River Group (“SJRG”) offers the following policy statement.

1. What modifications, if any, should the State Water Board make to the compliance schedule set forth in Part A of Order WR 2006-0006, and how should any modifications be structured to take into account any potential changes to the southern Delta salinity objectives or the program of implementation that may occur as a result of the State Water Board’s current review of the Bay-Delta Plan?

As Judge Robie explained in the *State Water Resources Control Board Cases*, (2006) 136 Cal.App.4th 674, the SWRCB must implement its water quality control plans. As Judge Robie explained in the *State Water Resources Control Board Cases*, (2006) 136 Cal.App.4th 674, the SWRCB must implement its water quality control plans and the objectives therein. It cannot change such plans or the objectives therein through water right proceedings. Whatever modifications the SWRCB makes to Order WR 2006-0006, it must continue implementing the Interior South Delta Salinity Objectives in the Bay-Delta Plan consistent with the program of implementation contained therein.¹

¹ For present purposes, the compliance points located at Brandt Bridge site (Station C-6), Old River near Middle River (Station C-8), Old River at Tracy Road Bridge (Station P-12), listed in Table 2 on page 13 of the SWRCB 2006 *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, shall be referred to as the “Interior South Delta Salinity Objectives.” SWRCB plans and policies do not define the “southern Delta,” but the term is generally synonymous with the jurisdiction of South Delta Water Agency (“SDWA”), whose boundaries are defined by Water Code Appendix §116-9.1.

Although multiple potential implementation actions have been identified, for over twenty years permanent barriers have been the only implementation action receiving any significant and serious time, effort, and consideration. Now, given limitations imposed by the NMFS Biological Opinion (“BIOP”), permanent barriers are no longer a realistic or feasible project alternative. Within the scope of the current proceeding, the SWRCB must determine whether there are any other actions the DWR and/or USBR may undertake to implement the objectives. If the SWRCB determines the DWR and/or USBR cannot fully implement the Interior South Delta Objectives, it must look to other potential implementation actions described in the Bay-Delta Plan. Although the program of implementation proposes additional actions under the SWRCB’s water right authority, modeling submitted by the DWR in the CDO proceeding adopting Order WR 2006-0006 indicated that changing export operations and/or additional flow from the San Joaquin River result in no significant improvements in Interior South Delta Salinity. The only other implementation action still available is for the CVRWQCB to impose discharge controls on in-Delta discharges of salts by agricultural, domestic, and municipal dischargers. To the SJRGA’s knowledge, this has not occurred, let alone been given serious consideration, even though the DWR has identified significant in-Delta discharges of salts from such sources.² In any event, the adoption of discharge controls by the CVRWQCB is beyond the scope of the current proceeding.

The likelihood that the current Interior South Delta Salinity Objectives cannot feasibly be implemented underscores the need for the SWRCB to complete its review of them. The SWRCB has a duty to consider and protect all beneficial uses of water made and to be made in the Delta. Such uses include habitat for fish and wildlife, such as Delta Smelt, as well as irrigated agriculture. If permanent barriers are the only feasible means of implementing the current Interior South Delta Salinity Objectives, but the Federal Endangered Species Act (“ESA”) prohibits their use, then the objectives are not reasonable and must be revised.

2. If the compliance schedule contained in Part A of Order WR 2006-0006 is modified, what interim protective measures, if any, should be imposed?

Before the SWRCB considers what interim protective measures should be imposed it first must consider what it being protected. Currently, Southern Delta irrigated agriculture and endangered species are both at issue and potentially at odds. Under the current Bay-Delta Plan, however, South Delta irrigated agriculture is protected if the Interior South Delta Salinity Objectives are met. However, no method other than the

² See DWR’s *Comments to the State Water Resources Control Board Regarding Information On the Southern Delta Salinity and San Joaquin River Flow Objectives and Their Program of Implementation* (available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/comments040609/dept_waterresources.pdf) and *Sources of Salinity in the South Sacramento-San Joaquin Delta* (available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/comments040609/dwr_appendixc.pdf), both of which have been submitted in association with the SWRCB’s review of the South Delta Salinity Objectives.

barriers contemplated by the South Delta Improvements Project (“SDIP”), and certainly no method within the authorities of the DWR and/or USBR, would implement the objectives. The NMFS NMFS BIOP, adopted to protect endangered species, does not allow for the SDIP. Since there are no interim protective measures that are realistically and reasonably feasible within the authorities of the DWR and/or USBR, no interim protective measures should be imposed in the current proceeding. Although, under the Bay-Delta Plan, the CVRWQCB shall impose discharge controls on in-Delta discharges of salts by agricultural, domestic, and municipal dischargers, such action would occur in a separate proceeding.

In its current review of the Interior South Delta Salinity Objectives, the SWRCB must consider the implications of the NMFS BIOP. With its broad scope, it is now the driver for everything in the Delta. Objectives requiring implementation measures precluded by the Federal ESA are neither feasible nor reasonable.

To the degree the SWRCB considers objectives that may be implemented through other actions, the SWRCB should consider that although irrigated agriculture is a beneficial use of water, illegally diverting and using water for such purposes is not. The beneficial use considered should therefore be the legal diversion and use of water for irrigated agriculture. South Delta agricultural beneficial use should consequently only be protected to the degree that legal diversion and use of water occurs.

In addition to impacting the “reasonable use” analysis illegal Delta Diversions also affect the attainability of those objectives. The SJRGA believes that illegal diversions in the Southern Delta have a major impact on Water Quality. Water illegally diverted lessens the assimilative capacity of the San Joaquin River, Old River and Middle River. In addition to this impact, illegal diversions then drain water at EC’s in excess of the objective. If illegal diversions in the South Delta are causing the Salinity objectives to be exceeded then the SWRCB’s program of implementation should address the timing, use and diversion of water.

Very truly yours,
O’LAUGHLIN & PARIS LLP

By:



TIM O’LAUGHLIN

cc: SJRG (electronic mail only)
See attached Service List (electronic mail only)

**WATER RIGHT HEARING TO CONSIDER MODIFICATION OF ORDER WR 2006-0006
DEPARTMENT OF WATER RESOURCES AND
THE UNITED STATES BUREAU OF RECLAMATION
SCHEDULED TO COMMENCE JUNE 25, 2009
REVISED SERVICE LIST
(June 19, 2009)**

PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The participants listed below agreed to accept electronic service, pursuant to the rules specified in the Notice.)

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